A **MOHD SAIFUDDIN AB RAHMAN v. PP & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
AZIZAH NAWAWI JCA
NORDIN HASSAN JCA
B [CRIMINAL APPEALS NO: W-05(SH)-214-04-2018 &
W-05(SH)-205-04-2018]
13 OCTOBER 2020

C ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Accused convicted for offence of drug trafficking – 4,045g cannabis found in carrier basket of motorcycle – Accused sentenced to life imprisonment and 15 strokes of whipping – Whether prosecution proved element of possession of drugs – Whether knowledge of drugs could be inferred – Whether defence probable and adequately considered – Whether investigation complete and proper – Whether conviction and*
D *sentence safe – Whether ought to be set aside – Dangerous Drugs Act 1952, ss. 39B(1)(a), 39B(2) & 39B(2A)(c)*

CRIMINAL PROCEDURE: *Appeal – Appeal against sentence – Appeal by prosecution – Accused convicted for offence of drug trafficking – 4,045g cannabis found in carrier basket of motorcycle – Accused sentenced to life imprisonment and*
E *15 strokes of whipping – Whether trial judge could exercise discretion in sentencing – Whether discretion exercised correctly – Whether accused satisfied requirement under s. 39B(2A) of Dangerous Drugs Act 1952 for trial judge to exercise discretion – Whether accused ought to be sentenced to death*

F A team of police officers had carried out surveillance at a location where, based on information received, a certain drug-trafficking activity would take place. The accused entered the scene riding a motorcycle alone and there was a bag in the motorcycle's carrier basket. As the accused stopped, the police immediately sprung into action. The accused attempted to flee but was successfully arrested. The bag, which was seized, was found to contain four
G slabs of dried plant materials later confirmed by the chemist to be 4,045g of cannabis. The accused was charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Satisfied that the prosecution had established a *prima facie* case, the trial judge called the accused to enter his defence. In his defence,
H the accused submitted that (i) he was riding the motorcycle with one 'Along' as the pillion rider; (ii) the bag belonged to Along; (iii) when the police raided them, Along managed to escape and had thrown the bag on the road; (iv) he did not try to escape from the police; and (v) he had no knowledge of the drugs in the bag. The accused's defence was supported by the testimony of
I SD2 who testified that (i) Along, who had discovered that his girlfriend and the accused were having an affair, arranged to meet the accused at a cafe on

the day of the incident; (ii) SD2 was invited to join the meeting; (iii) when SD2 arrived, he saw a commotion, a bag on the floor and the accused's arrest; (iv) when SD2 later asked Along about what had happened, the latter replied 'jangan ambil tahu' and that he was satisfied with what transpired as the accused could no longer disturb his girlfriend. At the close of the defence's case, the trial judge opined that the accused failed to rebut the presumption of trafficking on the balance of probabilities and failed to cast a reasonable doubt on the prosecution's case. The accused was found guilty and convicted for the offence. In the exercise of His Lordship's discretion under s. 39B(2) read with s. 39B(2A)(c) of the DDA, the trial judge sentenced the accused to life imprisonment and whipping of 15 strokes. Hence, the present appeals by both the accused and the prosecution. In support of his appeal against the conviction and sentence, the accused submitted that (i) the element of possession of the drugs by the accused had not been proven by the prosecution; (ii) the trial judge erred in giving excessive emphasis on the appellant's conduct of fleeing from the scene which was said to attract the inference of knowledge; (iii) the trial judge failed to consider adequately the appellant's defence; and (iv) the investigation was incomplete and was improperly conducted as the CCTV recordings at the vicinity and other related evidence were not produced to support the evidence of the prosecution's witnesses. The prosecution, in appealing against the sentence, brought forth the argument that (i) the sentence in accordance with the law was death sentence; and (ii) the accused had not satisfied the requirement under s. 39B(2A) of the DDA for the trial judge to exercise his discretion under s. 39B(2) of the DDA to impose the sentence of life imprisonment.

Held (dismissing accused's appeal and allowing prosecution's appeal)
Per Nordin Hassan JCA delivering the judgment of the court:

(1) The trial judge found that (i) the prosecution had established actual possession of the drugs by the accused, independent of the presumption under s. 37(d) of the DDA. As such, control or custody and knowledge of the drugs have been proven by direct or circumstantial evidence to support the said finding; and (ii) the appellant was arrested whilst trying to escape and the bag was seized from the carrier basket. The trial judge made these findings based on the credibility of witnesses that the appellant was seen riding the motorcycle alone with a bag in the motorcycle's carrier basket which was later found to contain cannabis. There was no compelling reason for the court to interfere with the findings of fact by the trial judge as the findings were supported by evidence. (paras 17, 18 & 21)

(2) The accused's conduct of trying to run away soon after the police shouted 'police' supported the fact that the accused knew that the bag contained drugs. This conduct was admissible under s. 8 of the Evidence Act 1950 as his conduct of trying to escape had the direct bearing on the

fact in issue as the drugs were found in the bag carried by the accused on his motorcycle. The trial judge was correct in assessing the accused's conduct together with other evidence in order to make a finding as to the significance of the appellant's conduct. Moreover, the accused denied trying to run when approached by the police. There was no reason to interfere with the trial judge's finding of fact and there was no excessive emphasis by the trial judge on the accused's conduct of trying to run from the police. The trial judge had exercised his judicial duty to assess all available evidence in order to make a correct finding. The contention by the appellant on this issue was untenable. (paras 24, 26, 28 & 30)

(3) The trial judge had taken into consideration and analysed the defence at length. The trial judge had adequately and thoroughly assessed the defence's case before coming to his findings. Furthermore, the evidence adduced supported the trial judge's findings on the assessment of the defence's case. (paras 32, 34 & 36)

(4) The CCTV footage was only a corroborative evidence if it was clear and admissible under the law. In this case, evidence was adduced that the CCTVs installed at the shops in the vicinity of the scene were not functioning. As such the CCTV recordings did not assist neither the prosecution's nor the defence's case. The non-production of the CCTV was not fatal to the prosecution's case nor did it prejudice the defence's case. (para 39)

(5) Section 39B(2) of the DDA conferred the discretion to the trial judge to sentence an accused convicted under s. 39B(1) of the DDA, as in the present case, with death or imprisonment for life. However, the discretion under s. 39B(2) of the DDA is subject to the circumstances laid down under s. 39B(2A) of the DDA. Paragraphs (a), (b), or (c) of s. 39B(2A) are to be read disjunctively and each of the paragraphs is to be read conjunctively with para. (d). There was no evidence that the accused had assisted the enforcement agency in disrupting drug trafficking activities within or outside Malaysia and there was also no certification by the Public Prosecutor in writing produced to that effect. The trial judge, in imposing the sentence of imprisonment for life against the appellant, failed to consider the mandatory requirement under para. (d) of s. 39B(2A) of the DDA. Clearly, this requirement had not been fulfilled for the imposition of imprisonment for life and 15 strokes of whipping. (paras 46, 47, 54 & 65)

(6) The conviction against the accused was safe and affirmed. However, with regard to the sentence, the prosecution's appeal was allowed. The sentence of imprisonment for life and 15 strokes of whipping was replaced with the sentence of death. (para 66)

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Alami Vegetable Oil Products Sdn Bhd v. Lombard Commodities Ltd [2009] 4 CLJ 700 CA ***(refd)***
Amri Ibrahim & Anor v. PP [2017] 1 CLJ 617 FC ***(refd)***
Benjamin William Hawkes v. PP [2020] 8 CLJ 267 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Kekatong Sdn Bhd v. Bank Bumiputra Malaysia Bhd [1998] 2 CLJ 266 CA ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Loh Kooi Choon v. Government Of Malaysia [1975] 1 LNS 90 FC ***(refd)***
Merck KGaA v. Leno Marketing (M) Sdn Bhd; Registrar Of Trade Marks (Interested Party) [2018] 6 CLJ 167 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
PP v. Zulkifli Arshad [2010] 6 CLJ 121 FC ***(refd)***
Ramis Muniandy v. PP [2001] 3 SLR 534 ***(refd)***
Samundee Devan Muthu Kerishnan v. PP [2010] 3 CLJ 269 FC ***(refd)***
Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 51A(1)
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a), (2), (2A)(a), (b), (c), (d), First Schedule
Evidence Act 1950, ss. 8, 9
Interpretation Acts 1948 and 1967, s. 17A

For the appellant - Shah Rizal & Nik Muammer Hurrie; M/s Shah & Hurrie
For the respondent - Nurul Farhana Khalid; DPP

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Trial No: WA-45A-53-08-2017 (overruled).]

Reported by Najib Tamby

JUDGMENT

Nordin Hassan JCA:

Introduction

[1] The appellant in this case is appealing against the decision of the High Court Kuala Lumpur in convicting the appellant for an offence of trafficking in drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA 1952") and was sentenced to life imprisonment and 15 strokes of whipping pursuant to s. 39B(2) read together with s. 39B(2A) of the same Act.

[2] On the other hand, the respondent, the Public Prosecutor, is appealing against the sentence imposed by the trial judge as the appellant has not satisfied the requirement under s. 39B(2A) for the trial judge to exercise his discretion under s. 39B(2) to impose the sentence of life imprisonment. The Public Prosecutor contends that the sentence in accordance with the law in the present case is the death sentence.

[3] The charge against the appellant reads as follows:

> Bahawa kamu pada 23.8.2018 jam lebih kurang 8.10 malam di kawasan Jalan Sri Persekutuan 8, Bandar Seri Pemaisuri di dalam Daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu cannabis seberat 4045 gram, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah seksyen 39B(2) Akta yang sama.

The Prosecution's Case

[4] The prosecution's case as established by evidence by its witnesses and accepted by the trial judge are as follows. On 23 August 2016, at about 4.30pm, ASP Saiful Hezrin bin Shariman ("SP2"), from the Narcotic Department, Police Contingent, Kuala Lumpur received an information of drug activity which will be carried out by a Malay male riding a motorcycle with Registration No. F 1943. The information also revealed that the colour of the motorcycle is black and white and the location of the said activity was at Jalan Sri Permaisuri 8, Bandar Seri Permaisuri, Cheras.

[5] Acted on this information, SP2 and his team, which comprises of 12 police personnel from the Narcotic Division went to the location at about 7pm and made an observation in front of a car wash shop with the name 'Shine' whilst waiting for the target. Thereafter, at about 8.05pm, SP2 saw the appellant riding a motorcycle with the registration number as mentioned in the information he had received earlier which was F 1943. The appellant was riding alone and stopped the motorcycle in front of the car wash shop. SP2 also saw a red bag in the motorcycle carrier basket. Next, SP2 signalled his team to apprehend the appellant and shouted "police" to the appellant. The appellant then left the motorcycle and ran but was arrested about ten meters from the motorcycle. The appellant was then brought to the motorcycle where SP2 made a search on the appellant but nothing incriminating was found. SP2 then took the red bag from the motorcycle carrier and having examined its content, four slabs of dried plant material wrapped with transparent plastic suspected to be cannabis was found.

[6] The four slabs of plant material were then sent to the chemist, SP4, who confirmed them to be cannabis with the weight of 4,045g and cannabis is a dangerous drug as listed under the First Schedule to the DDA 1952.

The Findings Of The Trial Judge At The Close Of The Prosecution's Case

[7] At the close of case for the prosecution, the learned trial judge, on the maximum evaluation of the evidence, found that the prosecution had succeeded in establishing actual possession of the impugned drugs by the appellant. The trial judge then proceeded to invoke the presumption of trafficking under s. 37(da) of the DDA 1952. Consequently, the trial judge concluded that a *prima facie* case under s. 39B(1)(a) had been established against the appellant and therefore the appellant was called to enter his defence.

[8] In arriving at this decision at the close of the prosecution's case, the trial judge made his findings of fact that the appellant had control, custody and knowledge of the impugned drugs which established actual possession of the drugs.

[9] The learned trial judge also accepted the evidence of the raiding party, in particular SP3, that the appellant was riding the motorcycle alone at the material time with the red bag in the motorcycle carrier basket. It was also the trial judge's finding that the appellant's conduct of fleeing the scene after SP2 shouted "police" raised a reasonable conclusion that the appellant knew about the drugs in the red bag.

The Defence

[10] The appellant gave his evidence on oath and in essence, his defence was that at the material time, he was riding the motorcycle with a person named "Along" with him as the pillion rider. The red bag belongs to Along who carried it on his shoulder while riding the motorcycle. Thereafter, when the appellant stopped the motorcycle in front of the car wash shop and when the police raided them, Along managed to escape and had thrown the bag on the road near the appellant and the motorcycle. The appellant further testified that at no time did he tried to escape from the police. The appellant also had no knowledge of the drugs in the red bag.

[11] Besides the appellant, Fahmi bin Abdul Rashid ("SD2") was called to testify in support of the appellant's evidence. SD2 had known the appellant for about five years. SD2 testified that on the day of the incident, at about 1pm, SD2 received a call from Along informing SD2 that his girlfriend and the appellant had an affair and he wanted to meet the appellant at Nana Café at 8pm on the same day. Along then invited SD2 to join him in meeting the appellant which SD2 agreed. SD2 then went to Nana Café and reached there about 7.40pm. At about 8pm, SD2 saw the appellant on his motorcycle and was surrounded by several people. SD2 also heard someone shouted "jangan lari" (don't run). Further, SD2 saw a bag on the road near the appellant. SD2 then went home and tried to call the appellant and Along but was unsuccessful. A month later, SD2 was informed by the appellant's sister that the appellant was arrested by the police for drugs' case. Next, SD2 met

Along a few months after the incident and asked him why the appellant was arrested by the police. Along then told SD2 "jangan ambil tahu" and said that he was satisfied of what he had done to the appellant resulting in the appellant's arrest by the police. Along also told him that the appellant can no longer disturb his girlfriend.

The Finding Of The Trial Judge At The End Of The Defence's Case

[12] At the end of the case, it was the finding of the learned trial judge that the appellant had failed to rebut the presumption of trafficking on the balance of probabilities and failed to cast a reasonable doubt on the prosecution's case. Consequently, the trial judge convicted the appellant for the offence as per the charge. However, the trial judge exercised his discretion under s. 39B(2) read with s. 39B(2A)(c) of the DDA 1952 and sentenced the appellant to life imprisonment and whipping of 15 strokes.

[13] Having evaluated the evidence adduced by the defence, the learned trial judge, in coming to his decision at the close of the case, has made his findings of fact that Along was a fictitious character invented by the appellant and SD2 was not at the place of the incident when the appellant was arrested. It was also the finding of the trial judge that SD2 had given his testimony in court merely to help the appellant. The trial judge had rejected the version of the incident adduced by the appellant and SD2.

The Appeal

[14] Counsel for the appellant had raised the following grounds to support the appellant's appeal:

(i) The trial judge failed to consider that the element of possession of the impugned drugs by the appellant had not been proven by the prosecution.

(ii) The trial judge erred in giving excessive emphasis on the appellant's conduct of fleeing from the scene which was said to attract the inference of knowledge.

(iii) The trial judge had failed to consider adequately the appellant's defence.

(iv) The investigation in the present case was not complete and properly conducted as the CCTV at the vicinity and other related evidence was not produced to support the evidence of the prosecution's witnesses.

Our Deliberation And Decision

The Issue Of "Possession"

[15] On this issue of possession, it is pertinent to refresh our memory on the basic principle of "possession" expounded 64 years ago and still a good law in the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237 where Thomson J said this:

'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed page 304):

> A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as the owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in the case of need.

[16] On the same issue, it is settled law that possession can be established by proving control or custody and knowledge, which is known as actual possession or *mens rea* possession or with the aid of the presumption under s. 37(d) of the DDA 1952 which is termed as presumed possession. This has been explained in plethora of cases including the Federal Court cases in *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129; [2006] 3 MLJ 193 and *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113.

[17] In the instant case, the learned trial judge had made his finding that the prosecution had established actual possession of the drugs by the appellant, independent of the presumption under s. 37(d). As such, control or custody and knowledge of the impugned drugs have been proven by direct or circumstantial evidence to support the said finding. This had also been explained in *Ibrahim Mohamad & Anor v. PP* (*supra*) in the following words:

> the law is well settled that having only custody or control over the said drugs is insufficient to establish "possession". *The physical act of custody or control must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumptions, knowledge has to be proved either by direct evidence or circumstantial evidence*. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking.
>
> (emphasis added)

[18] Reverting to the present case, the trial judge had made his finding based on the credibility of witnesses that the appellant was seen riding the motorcycle alone with a red bag in the carrier basket which was later found to contain cannabis. It was also the trial judge's finding that the appellant was arrested whilst trying to escape and the red bag was seized from the motorcycle carrier basket.

[19] In this regard, it is also settled principle of law that the appellate court should be slow in disturbing the finding of facts by the trial judge, who had the advantage of seeing and hearing the witnesses, unless the trial judge had wrongly evaluated the facts. (See *Amri Ibrahim & Anor v. PP* [2017] 1 CLJ 617; [2017] 1 MLJ 629 (FC); *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236 (FC)).

[20] On the same issue, the Federal Court in *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1 held as follow:

> The approach to be taken by an appellate court when dealing with a trial's court assessment of credibility of witness is well-established by high authorities. *The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such finding of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding.* (emphasis added)

[21] In the instant case, having perused the totality of evidence, we find that there is no compelling reason for this court to interfere with the findings of fact by the trial judge as alluded to earlier. The said findings were supported by the evidence presented before the court.

[22] Coming back to the issue of possession, the established facts were that the appellant was riding the motorcycle alone with a red bag in the motorcycle carrier basket and the bag contained dangerous drugs. The motorcycle is also registered under the appellant's name. Further, the appellant had tried to escape from being caught by the police although his attempt was unsuccessful.

[23] The facts in the present case has some similarity with the facts in the case of *Ramis Muniandy v. PP* [2001] 3 SLR 534 quoted with approval by the Federal Court in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; [2007] 5 MLJ 1 on the question of knowledge necessary to establish possession. In *Ramis*' case (*supra*), the drugs was also found on the motorcycle of the accused and on the issue of knowledge, Yong Peng How CJ had this to say:

> **Knowledge of the drugs**
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> The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis' motorcycle when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

[24] Likewise in the instant case, the appellant had physical control of the drugs when the drugs was placed in the motorcycle carrier basket ridden by the appellant. Additionally, the appellant's conduct of trying to run away soon after SP2 shouted "police", further supported the fact that the appellant knew that the red bag contained drugs. On this issue, it is relevant to make reference to the Federal Court case of *Samundee Devan Muthu Kerishnan v. PP* [2010] 3 CLJ 269 where Mohd Ghazali Yusoff FCJ said this:

> [15] We are also of the view that the contemporaneous conduct of the appellant in attempting to run away when PW7 identified himself as 'police' is relevant and admissible pursuant to s. 8 of the Evidence Act 1950 under the circumstances of the instant appeal. Such conduct, of

course not to be taken in isolation but together with all the other circumstances of the case. That would be the correct approach to circumstantial evidence (see *Chan Chwen Kong v. PP* [1962] 1 LNS 22).

...

[17] We find the evidence adduced by the prosecution before the learned trial judge showed that the appellant was clearly in possession of the plastic packages and that he had knowledge of the contents of the packages. The facts denote the said dangerous drugs were in his custody and control. He was in possession of a set of keys one of which was used to open the boot of the motorcar in which the dangerous drugs were found. *He was clearly aware of the packages and was in fact holding one of the packages when he was approached by the police and consequently attempted to run away. The combined strength of these facts gave rise to a strong inference that the appellant had mens rea possession of the packages containing the dangerous drugs and he had knowledge of the dangerous drugs. There was evidence of possession of the dangerous drugs independent of s. 37(d) of the Act*.

(emphasis added)

[25] Thus, on the totality of evidence and based on the authorities cited above, we agree with the finding of the trial judge that control, custody and knowledge of the drugs by the appellant had been proven and as such, actual possession had been established by the prosecution. In the circumstances, the contention by counsel for the appellant on the prosecution's failure to prove the element of possession is without merit.

The Excessive Emphasis By The Trial Judge On The Appellant's Conduct Of Running Away From The Scene

[26] In relation to the appellant's conduct of fleeing from the scene, firstly, it must be remembered that the appellant's conduct is admissible under s. 8 of the Evidence Act 1950 as his conduct of trying to escape has the direct bearing on the fact in issue, as the drugs were found in the bag carried by the appellant on his motorcycle. In this regard, the appellant had to explain his conduct as required by s. 9 of the same Act. This matter has been dealt with by the Federal Court in *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19 where the court held as follows:

[38] In this case, *the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has the direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction*. However, in his defence, the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence is that he knew what he was carrying (see *DPP v. Brooks* [1974] 2 All ER 840). (emphasis added)

[27] Further, in *Ibrahim Mohamad & Anor v. PP* (*supra*), the Federal Court stated this:

> [17] Whilst the conduct of the accused fleeing the scene may be a relevant factor to be considered, such conduct however must be weighed against the circumstances of the case. This is because even an innocent man may feel panicky and try to evade arrest when wrongly suspected of committing a crime. It is a common instinct of self-preservation ...
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> ...
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> [20] Based on the above s. 8(2) of the Evidence Act 1950, there are two types of conduct which is relevant, namely prior and subsequent conduct. **Evidence of conduct is an equivocal act and is capable of more than one interpretation. Accordingly, evidence of conduct must not be referred to in isolation. Instead, conduct must be considered with other evidence or circumstances**. (emphasis added)

[28] In the present case, we find that the trial judge was correct in assessing the appellant's conduct together with other evidence before the court in order to make a finding as to the significance of the appellant's conduct. Moreover, the appellant in his defence had denied trying to run after being approached by the police. A finding of fact has to be made as to whether the appellant's version in his defence that he did not run from the scene was to be accepted or the evidence of SP2 who said that he saw the appellant ran from his motorcycle after SP2 shouted "police" and was arrested ten meters from the motorcycle. This conduct of running away need to be assessed thoroughly as the trial judge need to determine further whether the appellant's conduct of running away, as found by the trial judge, was due to pure panic or because the appellant knew about the impugned drugs in the bag.

[29] On the appellant's conduct, this is how the trial judge had approached the issue as reflected in his grounds of judgment:

> [33] Meneliti kes *Ibrahim Mohamad & Anor v. PP* (*supra*) **adalah ternyata tertuduh melarikan diri apabila diperkenalkan polis oleh SP2** pegawai serbuan sebelum ditunjukkan dadah dalam beg merah di dalam raga motorsikal tertuduh.
>
> [34] Pegawai Penyiasat SP3 di dalam kes ini mengesahkan motosikal dengan nombor pendaftaran F 1943 adalah didaftar di atas nama tertuduh. SP2 Pegawai serbuan mengesahkan bukan sahaja maklumat yang diterima secara spesifik merujuk kepada nombor pendaftaran motosikal yang sama. Malah pada masa tertuduh dilihat menunggang motosikal berseorangan dan beg merah telah sedia ada di dalam raga motosikal tersebut.
>
> [35] Dengan kata lain pemilikan, kawalan dan jagaan ke atas beg yang berada di dalam raga motosikal hanya dibawah kawalan dan jagaan tertuduh. **Manakala pengetahuan *mens rea* adalah dilihat secara tersirat apabila tertuduh melarikan diri** [kes *Ibrahim Mohamad & Anor v. PP* (*supra*)] (emphasis added)

[30] In this regard, based on the evidence before him and having assessed the credibility of the witnesses, the trial judge has made his finding that the appellant tried to run from being apprehended by the police and his conduct showed that he knew about the drugs in the red bag. Here, we have no reason to interfere with the trial judge's finding of fact and we also find that there was no excessive emphasis by the trial judge on the appellant's conduct of trying to run from the police at the material time. The trial judge had exercised his judicial duty to assess all available evidence in order to make a correct finding. Therefore, the contention by the appellant on this issue is untenable.

Failure Of The Trial Judge To Adequately Consider The Defence Case

[31] Next, counsel for the appellant submitted that the trial judge had failed to adequately consider the defence's case. The main defence forwarded by the appellant was that the red beg belonged to Along who carried it on his shoulder whilst riding with the appellant at the material time. He then managed to escape when ambushed by the police. The appellant was also framed up by Along as the appellant was said to have an affair with Along's girlfriend.

[32] In relation to this defence, the trial judge had taken into consideration and analysed this defence at length as reflected at paras. 39 until 64 of his grounds of judgment and made the following finding:

> [67] Mahkamah Tinggi ini memutuskan bahawa Along adalah watak rekaan tertuduh manakala **Fahmi [SD2] tidak berada di tempat kejadian semasa tertuduh ditangkap dan datang ke Mahkamah semata-mata untuk menolong tertuduh**. Pembelaan tertuduh dengan saksinya SD2 adalah gagal menimbulkan keraguan yang munasabah dan gagal mematahkan anggapan mengedar di bawah s. 37(da)(vi).
>
> (emphasis added)

[33] In arriving at this conclusion, the learned trial judge has made the following findings:

(i) The evidence of SP2 is credible and accepted his evidence that the appellant was riding the motorcycle alone and was caught with a red bag which contained the drugs in the motorcycle carrier basket.

(ii) The contention that the appellant was framed up by Along was improbable as the drugs involved were expensive and difficult to obtain for it to be used to frame up the appellant. Further, the appellant in his testimony said that Along is just a freelance dispatch boy and as such Along surely cannot afford to obtain the four slabs of cannabis just to frame up the appellant.

(iii) There were material discrepancies in the evidence of the appellant and SD2.

(iv) The defence had failed to adduce the detail particulars of Along including his full name although the appellant and SD2 had known Along for several years.

[34] Having read the trial judge's grounds of judgment, we are of the view that the trial judge had adequately and in fact, had thoroughly assessed the defence's case before coming to his findings.

[35] Be that as it may, even if the trial judge failed to consider the defence's case thoroughly, this court may review and re-evaluate the evidence in the present case as this appeal is a continuation of the proceedings by way of rehearing as lucidly explained by plethora of cases including the Federal Court case of *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800 which is as follows:

> I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. *The Court of Appeal is in the position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings*. In a case involving purely question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct (see *Mohamed Mokhtar v. PP* [1972] 1 MLJ 122). (emphasis added)

(See also *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579).

[36] Reverting to the instant case, we find, the evidence before the court supports the trial judge's finding with regards to the assessment of the defence case. The evidence of ASP Saiful Hezrin bin Shariman (SP2), which had been accepted by the trial judge instead of the appellant, was not something inherently incredible. The trial judge then concluded that the defence had not raised a reasonable doubt as to the truth of the prosecution's case. As such, we find that, the finding of the trial judge was correct (See *PP v. Mohamed Ali* [1962] 1 LNS 129; [1962] 1 MLJ 257).

[37] Hence, the issue that the trial judge had failed to consider adequately the defence's case is devoid of any merit.

The Non-Production Of The CCTV

[38] Lastly, is the issue of the CCTV. In essence, counsel for the appellant contended that the failure to produce the CCTV at the vicinity of the scene is fatal to the prosecution's case.

[39] On this issue, the investigating officer, SP3, testified that the CCTV installed at the shops in the vicinity of the scene were not functioning and as such, were not taken by him as exhibits in the present case. Here, it is our view that the CCTV footage is only a corroborative evidence if it is clear and admissible under the law. In the present case, evidence was adduced that the CCTV were not functioning. As such the CCTV do not assist the prosecution's case or the defence's case. Clearly, the non-production of the

CCTV is not fatal to the prosecution's case or prejudice the defence's case. In the recent decision of the Federal Court in *Benjamin William Hawkes v. PP* [2020] 8 CLJ 267, Zabariah Mohd Yusof FCJ, delivering the judgment of the court said this:

> [58] The CCTV footage was never tendered as the prosecution's exhibit as forming part of the prosecution's case, simply because the footage was not clear and would be of no assistance to the prosecution's case … Hence, it is understandable why the CCTV footage has never been intended to be part of the prosecution's exhibits or evidence, and thus, there is no duty on part of the prosecution to deliver such CCTV footage to the appellant before the commencement of trial under s. 51A(1)(b) of the CPC.
>
> [59] **If the CCTV was unclear and unable to assist the prosecution's case, how could it assist the defence case. Therefore, it cannot be said that the CCTV footage would be evidence favourable to the defence**.
>
> (emphasis added)

[40] Thus, the appellant's contention on this issue is also without merit.

[41] The trial judge was also correct in invoking the presumption of trafficking under s. 37(da) as the amount of drugs exceeded 200g of cannabis. The provision states as follows:

> (da) any person who is found in possession of:
>
> ...
>
> (vi) 200 grammes or more in weight of cannabis;
>
> ...
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking the said drug;

[42] In this regard, it is instructive to make reference to the Federal Court case of *PP v. Zulkifli Arshad* [2010] 6 CLJ 121 at p. 131 where the court opined as follows:

> [16] … In the instant appeal, the learned trial judge found as a fact that the respondent was in actual possession of the drugs in the car and in the house PS31-3. So, did the Court of Appeal. The only flaw, as submitted, is that both the High Court and the Court of Appeal did not invoke the presumption under s. 37(da)(vi) of the Act. But on the facts and evidence of this case that should not be fatal to the prosecution. *We are of the view that having been established as a fact by the trial judge that there was actual possession of the drugs by the respondent, the weight of which exceeded 200 grammes of cannabis, then the statutory presumption under s. 37(da)(vi) must come into play …*
>
> (emphasis added)

[43] Further the trial judge had also made his finding that the appellant had failed to rebut the presumption under the said s. 37(da) and failed to raise a reasonable doubt on the prosecution's case.

[44] Based on the aforesaid reasons, we find the conviction against the appellant under s. 39B(1)(a) of the DDA 1952 is safe and we have no reason to disturb the said conviction.

Appeal Against Sentence By The Respondent

[45] In the present case the trial judge had invoked s. 39B(2) read with s. 39B(2A)(c) of the DDA 1952 and sentenced the appellant to life imprisonment and 15 strokes of whipping.

[46] It is not in dispute that s. 39B(2) confers the discretion to the trial judge to sentence an accused convicted under s. 39B(1), as in the present case, with death or imprisonment for life. The provision reads as follows:

> Any person who contravenes any of subsection (1) shall be guilty of an offence against this Act and **shall be punished on conviction with death or imprisonment for life** and shall, **if he is not sentenced to death, be punished with whipping not less than fifteen strokes**.
>
> (emphasis added)

[47] However, the discretion under s. 39B(2) is subject to the circumstances laid down under s. 39B(2A) of the same Act which states:

> In exercising the power conferred under subsection (2), the Court in imposing the sentence of imprisonment for life and whipping not less than fifteen strokes, **may have regard** only to the following circumstances:
>
> (a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;
>
> (b) there was no involvement of agent provocateur; **or**
>
> (c) the involvement of person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; **and**
>
> (d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.
>
> (emphasis added)

[48] In interpreting a statutory provision, it is trite that, where the words used are plain and unambiguous, it is the duty of the court to give its natural and ordinary meaning and not to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning. (See *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; [1980] 2 MLJ 273).

[49] Further, it is of paramount importance to have regard to the intention of Parliament in construing an Act of Parliament. This has been explained in plethora of authorities including the case of *Merck KGaA v. Leno Marketing (M) Sdn Bhd; Registrar Of Trade Marks (Interested Party)* [2018] 6 CLJ 167 (FC) where it was held as follows:

> [80] It is well-established that the words used in a statute best declare the intention of Parliament; where the words are unambiguous, the court is bound to give effect to them. Per Tindal CJ in *Sussex Peerage* Case [1844] 11 C1 & F 85 at 143 (quoted with approval by this court in *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713 at p. 747; [2005] 2 MLJ 685 at [155]):
>
> > If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver.
>
> ...
>
> [82] The choice of words employed by the draftsman is significant. It is presumed that the draftsman employed particular words in order to convey the intention of Parliament. This was emphasised by the House of Lords in *Farrell v. Alexander* [1976] 2 All ER 721 at 735-736 (quoted with approval by this court in *Generation Products Sdn Bhd v. Majlis Perbandaran Klang* [2008] 5 CLJ 417 at [35]; [2008] 6 MLJ 325 at [41]):
>
> > *Since the draftsman will himself have endeavour to express the parliamentary meaning by the words used in the primary and most natural sense which they bear in the same context, the court's interpretation of the meaning of the statutory words used should thus with what Parliament meant to say.*
> >
> > The first or 'golden' rule is to ascertain the primary and natural sense of the statutory words in their context, since it is to be presumed that it is in this sense that the draftsman is using the words to convey what it is that the Parliament meant to say. They will only be read in some other sense if that is necessary to obviate injustice, absurdity, anomaly or contradiction, or to prevent impediment of the statutory objective.
>
> (emphasis added)

[50] Additionally, the issue of harshness or unjustness of a statutory provision are matters to be debated and decided by Parliament as explained lucidly by the Federal Court in *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 at p. 188 where Raja Azlan Shah FJ (as His Highness then was) said this:

> The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament.

[51] Moving on to the issue at hand, the next pertinent consideration is the intention of Parliament in enacting the provision of ss. 39B(2) and 39B(2A) of the DDA 1952. In this regard, the Hansard can be used to assist in interpreting the intention of Parliament (see *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713).

[52] In relation to this, the Hansard of 30 November 2017 is relevant where the then Honourable Minister, Dato' Sri Azlina Othman Said in answering to a question, explained as follows:

> Yang Berhormat tanya saya tentang perkataan 'and' dalam hujung seksyen 39B(2A)(d). Dasar yang telah ditentukan ialah supaya perenggan (d) menjadi suatu yang kehendak kepada mandatori iaitu perlu dipenuhi sekira mahkamah ingin mempertimbangkan untuk menjatuhkan hukuman penjara seumur hidup. Dalam hal ini, (a), (b), dan (c) – (a), (b), (c) dibaca secara (*sic*) injunctive **tapi akan dibaca secara conjunctive dengan (d). Maknanya (d) itu adalah keperluan utama untuk hakim menggunakan kuasa budibicara**.
>
> (emphasis added)

[53] In explaining the said provision, the Minister further said the following:

> Kerajaan tidak bersetuju dengan penggantian perkataan 'and' dengan perkataan 'or' di akhir frasa (2A)(c). Diperhatikan bahawa terletaknya perkataan 'and' diakhir fasal (2A)(c) bermaksud *mahkamah hendaklah mengambil fasal (2A)(d) secara bersama atau conjunctive dengan salah satu daripada (2A)(a),(b), atau (c) atau mana mana kombinasi dari ketiga-tiganya. Dalam kata lain, pertimbangan terhadap fasal (2A)(d) adalah wajib dalam setiap kes di mana mahkamah membuat pertimbangan sama ada hendak menjatuhkan hukuman penjara seumur hidup dengan sebatan.*
>
> ...
>
> Kerajaan tidak bersetuju dengan cadangan untuk mengeluarkan perkataan 'only' dalam fasal (2A) dan juga tidak bersetuju dengan pindaan hukuman yang dicadangkan. *Kerajaan berpandangan bahawa pengeluaran perkataan 'only' tersebut akan membuka luas faktor-faktor yang boleh diambil kira oleh mahkamah dalam memutuskan hukuman. Keadaan ini juga akan membawa kepada situasi ketidakseragaman dalam hukuman sebagaimana berlaku sebelum tahun 1983.*
>
> …
>
> Diperhatikan disini bahawa faktor (a),(b) dan (c) berkaitan dengan kesalahan spesifik yang telah pun dilakukan oleh tertuduh. Hanya faktor (d) yang berkaitan dengan satu kelebihan yang boleh diperolehi agensi penguatkuasa dalam usaha menggendalikan pengedaran dadah. *Oleh itu, faktor (d) harus wajib dipertimbangkan oleh mahkamah jika niat dan semangat di sebalik pindaan ini hendak dizahirkan iaitu memperkasa agensi penguatkuasa dalam memerangi pengedaran dadah dan melindungi kepentingan masyarakat*.
>
> (emphasis added)

[54] The Minister's explanation above-mentioned clearly revealed the intention of Parliament, in that the condition in para. (d) of s. 39B(2A) must be satisfied before the discretion to impose the sentence of life imprisonment under s. 39B(2) can be invoked. It is a mandatory requirement. Thus, paras. (a), (b) or (c) of s. 39B(2A) are to be read disjunctively and each of the paragraph is to be read conjunctively with para. (d).

[55] In this regard, the purposive approach must be taken in interpreting s. 39B(2A) to ensure the intention of the Legislature is carried out and this is also in consonance with s. 17A of the Interpretation Acts 1948 and 1967 which provides:

> 17A. In the interpretation of a provision of an Act, *a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object*.
>
> (emphasis added)

[56] The other important feature of s. 39B(2A) is the usage of the word "only" before paras. (a), (b), (c) and (d). Therefore, the power of the court to impose the sentence of imprisonment for life and whipping of not less than fifteen strokes is to be exercised only with regard to the circumstances specified in these paragraphs and not in any other circumstances. This had also been explained by the Minister in Parliament as alluded to earlier and in the explanatory statement to the Dangerous Drugs (Amendment) Bill 2017.

[57] Coming back to the provision of s. 39B(2A)(d), the condition for its application is that the convicted person had assisted the enforcement agency in disrupting drugs trafficking activities within or outside Malaysia. This is a question of fact to be determined by the trial judge and one of the considerations that may be taken into account is the certificate in writing by the Public Prosecutor which certify that the convicted person had assisted an enforcement agency in disrupting drug trafficking activities although it was not expressly provided under s. 39B(2A). In the explanatory statement to the Dangerous Drugs (Amendment) Bill 2017 (DR 45/2017) it states:

> The proposed amendment also seeks to revert to the position prior to the enactment of Act A553, where clause 2 seeks to amend subsection 39B(2) of Act 234 to empower a Court to impose a punishment of death or imprisonment for life and whipping of not less than fifteen strokes for the offence of drug trafficking. However, *in imposing the punishment of imprisonment for life and whipping of not less than fifteen strokes, the Court may have regard to any of the circumstances specified in the proposed new paragraphs 39B(2A)(a), (b), (c) and the Court shall have regard to a certification in writing by the Public Prosecutor that in the Public Prosecutor's determination the person convicted under subsection 39B(2) has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia*.
>
> (emphasis added)

[58] Apart from this, the word "may" in s. 39B(2A) does not give the discretion to the trial judge to apply other circumstances other than those as laid down therein. Here, what is pertinent is the intention of the Legislature, and in the present case as reflected in the Hansard as alluded to earlier.

[59] In *Benjamin William Hawkes*'s case (*supra*) the interpretation of the word "shall" in s. 51A(1) of the Criminal Procedure Code was raised as an issue and the Federal Court opined that whether the word "shall" is to be construed as mandatory or directory depends on the intention of the Legislature. In this case it was held that the word "shall" is only directory, taking into account the intention of the Legislature.

[60] This issue had been explained by the Federal Court in the following manner:

> [41] The crucial issued for consideration hinges on the effect to be given to word "shall" as appearing in s. 51A(1) of the CPC. Is the court obliged to construe the word "shall" as mandatory in this case.
>
> …
>
> [43] The Supreme Court case in *Hee Nyuk Fook v. PP* [1988] 1 LNS 15; [1988] 2 MLJ 360 provides a useful guideline in ascertaining whether the word "shall" provided in a provision is to be construed as mandatory. *It was held that it largely depends on the intention of the Legislature*, the facts and circumstances of the case and also the injustice that it would bring in interpreting the provision in a certain way. It was in relation to s. 158(2) of the CPC. The Supreme Court held that:
>
> > The question that arises is whether s. 158(2) is mandatory or directory. In our view, the word "shall" appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other (see *Interpretation of Statutes*, 7th Ed., p 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order whether the matter is imperative or only directory (see *Howard v. Bodington* (1877) 2 P.D. 203 at p 211).
> >
> > Applying the rest to the facts and surrounding circumstances of the case, we hold that in so far as this case is concerned, the provision of s. 158(ii) is not imperative but directory. The provisions contained therein only lay down a rule of procedure and do not relate to the mode of trial.
>
> ...

[46] *Applying the principles as enunciated in the aforesaid cases, whether the word "shall" in a particular legislation is mandatory or directory depends upon the intention of the Legislature in question which is ascertained by looking at the whole scope of the statute to be construed*. The used of the word "shall" would not by itself make a provision of the Act mandatory. It is to be construed with reference to the scheme of the statute and the context in which it is used. In *Chong Seok Leng v. PP* [1988] 2 MLJ 481 at p. 489 (MLJ) (tab 6). Chan Sek Keong JC (as the then was) explained the relevant rules of interpretation to be given to the word "shall" which appears in legislation as follows:

> I now turn to the wording of s. 23(1) of the Interpretation Act. Structurally, it is in two parts. The first part provides that "subsidiary legislation ... shall, unless it be otherwise provided … be published in the *Gazette*". Ignoring for the time being the effect of the qualifying clause, the effect of which I shall discuss later, the use of the word "shall" in a statute to qualify a thing to be done ... ie, it is mandatory. *However, it is not conclusive in every case. In the appropriate context, it may be directory. Whether or not it is mandatory or directory depends on the legislative intent*. How does court ascertain the legislative intent in such a case? The relevant rules of interpretation applicable to an enactment which is mandatory in form have been summarised succinctly by Subba Rao J in *State of U.P. v. Babu Ram* AIR [1961] SC 751 at p 765 as follows:
>
> > (29) The relevant rules of interpretation may be briefly stated thus: when a statute uses the word "shall", *prima facie* it is mandatory, but *the court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute*. For ascertaining the real intention of the legislature the court may consider, *inter alia*, the nature of design of the statute, and the consequences which would follow from construing it one way or another, the impact of other provisions whereby the necessity of complying with provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and above all, whether the object of the legislation will be defeated or furthered.
>
> (emphasis added)

[61] Likewise the word "may" in s. 39B(2A), it must be given the mandatory effect as clearly intended by the Legislature.

[62] In the case of *Kekatong Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [1998] 2 CLJ 266, this court had dealt with the same issue with regard to the usage of the word "may" and opined as follows:

> *First, it has been recognised by high authority that when a provision in a statute uses permissive language such as "may" it is a question of legislative intent, dependent upon a number of factors, whether the intended result is mandatory or directory*. As Lord Campbell C.J. said in *Liverpool Borough Bank v. Turner* [1861] 30 LJ Ch. 379, 380:

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> No universal rule can be laid down … *It is the duty of courts of justice to try to get at the real intention of the legislature* by carefully attending to the whole scape of the statute to be construed.

Again, in *Howard v. Bodington* [1877] 2 PD 203, 211, Lord Penzance said:

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> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in the aspect decide whether the enactment is what is called imperative or only directory …

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> I have been very carefully through all the principal cases but upon reading them all, the conclusion at which I am constrained to arrive is this, that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was

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> expressed by Lord Campbell in the case of *Liverpool Borough Bank v. Turner* [1861] 30 LJ Ch. 379.

> We do not apprehend the approach to statutory interpretation formulated in the cases cited above to have altered or modified through passage of time. And no authority was cited to us during argument to suggest

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> anything to the contrary.

> *It is therefore wrong to assume as a matter of course that whenever Parliament uses the word "may" in a statute it never means "must".*

(emphasis added)

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[63] On a similar issue, this court in *Alami Vegetable Oil Products Sdn Bhd v. Lombard Commodities Ltd* [2009] 4 CLJ 700 held as follows:

> **(3) The word "may" in s. 2(2) of the Convention Act – as construed in *Sri Lanka Cricket* – means "must"**. The use of further qualifying words after "may" could have the effect of making a *prima facie* directory statue into a mandatory one. In *re Shuter (No. 2)* (folld).

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(emphasis added)

[64] In the present case, the qualifying words after the word "may" in s. 39B(2A) which are "may have regard only to the following circumstances" clearly indicate its mandatory effect.

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[65] Reverting to the instant case, no evidence was adduced during trial that the appellant had assisted the enforcement agency in disrupting drug trafficking activities within or outside Malaysia and there was also no certification by the Public Prosecutor in writing produced to that effect. The trial judge, in imposing the sentence of imprisonment for life against the

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appellant, had failed to consider the mandatory requirement under para. (d) of s. 39B(2A) of the DDA 1952. Clearly this requirement had not been fulfilled for the imposition of imprisonment for life and 15 strokes of whipping. This error by the trial judge warrants the intervention of this court.

Conclusion

[66] Based on the aforesaid reasons, we unanimously find that the conviction against the appellant is safe and as such we dismissed the appellant's appeal against the conviction. The trial judge's decision on the conviction is affirmed. However, with regard to the sentence, the respondent's appeal is allowed. The sentence of imprisonment for life and 15 strokes of whipping is replaced with the sentence that the appellant be hanged by the neck until he is dead.